

as much more than a reseller of services that relied on the incumbent provider's facilities exclusively. Indeed, Congress plainly contemplated that a competing provider would not rely on the incumbent provider's facilities exclusively. Competitors' reliance on the incumbent provider's facilities exclusively would never result in real customer choice because all providers would be relying on identical facilities to provide telecommunications services. Consequently, competition would not result in new networks or "new" facilities but would simply be the same underlying services differentiated only by marketing and software additions.

It is impossible to argue that this vision of pseudo competition is consistent with Congressional intent in crafting Section 271. Congress contemplated the entry of facilities-based competitors into the market for local exchange services. The Act's Conference Report explains:

With respect to the facilities-based competitor requirement, the presence of a competitor offering the following services specifically does not suffice to meet the requirement: (1) exchange access; (2) telephone exchange service offered exclusively through the resale of the BOC's telephone exchange service; and (3) cellular service. The competitor must offer telephone exchange service either exclusively over its own facilities or predominantly over its own

facilities in combination with the resale of another carrier's service.<sup>29</sup>

Although the intent was that a competing provider would probably obtain some services and capabilities from the BOC itself, it would provide the relevant service over some of its own facilities:

The Committee does not intend that the competitor should have to provide a fully redundant facilities-based network to the incumbent telephone company's network, yet it is expected that the facilities necessary for a competitive provider will be present.<sup>30</sup>

Congressman W.J. (Billy) Tauzin indicated in his extended remarks that Congress intended the Commission to establish guidelines relating to the satisfaction of the "predominantly over its own facilities" requirement.

It is also my understanding that the competing provider will be deemed to be providing service 'predominantly' over its facilities if more than 50% of the local loop and switching facilities used by the competing provider to provide telephone exchange service is owned by the competing provider or owned by entities not affiliated with the Bell company that is applying

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<sup>29</sup> 142 Cong. Rec. H1078, H1117 (daily ed. Jan. 31, 1996) (emphasis added).

<sup>30</sup> H.R. Rep. No. 104-204, at 77 (1995) (emphasis added).

for interLATA authority.<sup>31</sup>

Ameritech's proposed interpretation is clearly inconsistent with this statement and the underlying purpose of this part of the 1996 Act.

In contrast to being directed at promoting facilities-based competition, the purpose of the 1996 Act's additions to Section 214 is to ensure that customers continue to obtain service as competition is introduced. As such, Section 214(e)(1)(A)'s reference to facilities relates to a carrier being able to recover its costs for the services that it provided and does not relate to promotion of facilities-based competition. This distinction eviscerates the analogies the FCC sought to draw in the Universal Service proceeding between the use of the term facilities in Section 214(e)(1)(A) and Section 271(c)(1)(A).<sup>32</sup>

Because Section 214(e)(1)(A) is related to cost-recovery, the resale of an incumbent's unbundled network elements priced on a forward-looking basis is economically consistent with the sale of services provided over new facilities constructed by

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<sup>31</sup> 141 Cong. Rec. E1699 (daily ed. Aug. 11, 1995) (statement of Rep. Tauzin) (emphasis added).

<sup>32</sup> In re Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, paras. 168 (May 8, 1997).

a competing carrier. Because Section 214 is concerned with cost recovery and ensuring that customers receive service, it would not be wholly inconsistent with the goals of Section 214 to consider unbundled network elements to be the reseller's own facilities. In stark contrast, the objective of Section 271 is to promote the development facilities-based competition and it is inconsistent with the goals of that Section to consider unbundled network elements to qualify as the resellers' "own facilities".

Accordingly, in the context of applying Section 271, the Commission should not simply adopt its previous interpretation of the term "facilities" (a definition that includes unbundled network elements of other carriers) for purposes of Section 214(e)(1)(A). Instead, the Commission should consider in further detail what facilities a carrier must own or lease before it is "facilities-based" for purposes of Section 271. There is obviously a need for the Commission to establish guidelines regarding what constitutes "predominantly over its own facilities".<sup>33</sup> The Commission should look to the DOJ's

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<sup>33</sup> In a May 29, 1997 speech to the United States Chamber of Commerce's Insider's Forum, FCC Chairman Reed Hundt expressly recognized the need for the Commission to establish generic rules to guide Commission review of Section 271 applications. "Hundt Says Merger Guidelines Should Be Spelled Out For Communications

Evaluation of SBC's Section 271 request in Oklahoma for guidance on what facilities could be used to determine whether the services provided are actually "facilities-based".

**III. FCC Grant of the Application is not in the Public Interest.**

As the DOJ recognized in its evaluation of SBC's Section 271 request for Oklahoma, Section 271's public interest provision is vital because it protects against a scenario under which Section 271(c)(1)(A)'s (Track A's) requirements and Section 271(c)(2)(B)'s Competitive Checklist prove inadequate to open fully local telephone markets.<sup>34</sup> Ameritech's Application reflects that it interprets the Commission's public interest evaluation primarily to be a determination of whether an additional competitor in the market for interexchange service,

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Industry", Communications Today (May 30, 1997). Chairman Hundt's comments in that speech echo TW Comm's discussion of the necessity for the Commission to establish generic guidelines in order to complete its review of applications for Section 271 authority in the comments it submitted opposing SBC Communications Inc.'s request for Section 271 Authority in Oklahoma. See TW Comm Comments on SBC's Application for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Oklahoma, CC Docket No. 97-121 (filed May 1, 1997). The need for generic guidelines regarding the definition of facilities-based - as well as guidelines regarding other aspects of Section 271 - has not been diminished since TW Comm filed those comments.

<sup>34</sup> DOJ Comments in SBC Section 271 Proceeding at 38.

specifically one that could potentially satisfy consumer demand for "one-stop shopping" for local and long distance services, will benefit consumers. Such an interpretation undermines both Section 271 as well as the competitive goals of the entire 1996 Act.

It is virtually impossible to overstate the importance of the Commission's public interest determination under Section 271 to the success of the competitive goals of the Telecommunications Act of 1996. Section 271 and its companion, Section 272, constitute the heart of the 1996 Act. One of the fundamental competitive "bargains" of the 1996 Act is the requirement that the BOCs open their local markets to competition prior to their obtaining the opportunity to provide interLATA toll service in those same markets. As noted by the Commission itself:

The 1996 Act opens local markets to competing providers by imposing new interconnection and unbundling obligations on existing providers of local exchange service, including the BOCs. The 1996 Act also allows the BOCs to provide interLATA services in the states where they currently provide local exchange and exchange access services once [after] they satisfy the requirements of section 271. . . . [T]he statute links the effective opening of competition in the local market with the timing of BOC entry into the

long distance market.<sup>35</sup>

This legislative requirement presents a "win-win" situation for consumers because they receive the benefits of increased competition in both toll and local markets: more efficient, more attentive service, greater innovation and, of course, lower prices.<sup>36</sup>

The statutory linkage between opened, competitive local service markets and entry by a BOC such as Ameritech into interLATA markets makes it incumbent upon the Commission to tread warily as it starts down the Section 271 road. Entry into the interLATA market is the single most significant inducement for the BOCs to meet the Competitive Checklist requirements of section 271(c)(2)(B). However, once entry is granted, all

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<sup>35</sup> In re the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, para. 7 (Dec. 24, 1996) (emphasis and interpretation added) (hereinafter "First Report and Order").

<sup>36</sup> The Commission further noted within that same Order:

With the removal of legal, economic, and regulatory impediments to entry, providers of various telecommunications services will be able to enter each other's markets and provide various services in competition with one another.

Id.

incentives for Ameritech to facilitate a competitive local market vanish immediately. As the DOJ accurately observed in its evaluation of SBC's Section 271 request in Oklahoma, after SBC receives Section 271 authority from the FCC, "its incentives to cooperate in removing the remaining obstacles to entry would be sharply diminished, thereby undermining the objectives of the 1996 Act."<sup>37</sup> One need look no further than the rearguard actions of the non-BOC ILECs in opposition to open interconnection arrangements to find validation of this incentive principle.<sup>38</sup> The most obstreperous behavior and the greatest resistance to implementation of competitive market entry is displayed by ILECs

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<sup>37</sup> Id. at 36.

<sup>38</sup> It is no coincidence that the legal challenges to the Commission's August 8, 1996 Interconnection Order, In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order (Aug. 8, 1996), now before the Eighth Circuit in Iowa Util. Bd. v. FCC, No. 96-332 and consolidated cases, were brought by GTE, a non-BOC ILEC. GTE and other non-BOC ILECs that are not subject to Section 271 have been among the most vigorous opponents to implementation of the 1996 Act. Indeed, TW Comm's frustration in attempting to negotiate interconnection with Ameritech prior to the 1996 Act evidences Ameritech's un-incentivized behavior. Even then, Ameritech was attempting to be seen by Judge Green as worthy of "interLATA relief". In re Time Warner AxS of Ohio and Time Warner Communications of Ohio, L.P. v. Ameritech Ohio, PUCO Case No. 96-66-TP-CC (Opinion & Order dated March 28, 1996).

who do not have such incentives.

Thus, the Application squarely places before the Commission the formidable challenge of implementing Section 271. It does so, however, at a time when the Commission, in fulfillment of its other heavy responsibilities under the 1996 Act, has not yet had the opportunity to consider comprehensively the necessarily complex issues inherent in the statute's implementation. Although there are undoubtedly benefits to consumers to be gained from making the interLATA interexchange market in Michigan even more competitive through Ameritech's entry, the possible detriments to local competition from Commission action that is not well-considered far outweigh those minor competitive benefits. Any action on the Application must be premised on a long-term view of the 1996 Act and its underlying policies.

One of the issues that the Commission should consider in its public interest analysis is the extent to which the Commission's ongoing responsibilities with regard to Section 271(d)(6), 47 U.S.C. § 271(d)(6), require that BOC's competitors must be operational in a meaningful sense, rather than merely requiring those competitors to execute agreements pursuant to

Section 271(c)(2)(A), 47 U.S.C. § 271(c)(2)(A). Indeed, an analysis of the Commission's ongoing enforcement responsibilities envisioned by Section 271(d)(6) is inconsequential if the only requirement for BOC entry into the in-region interLATA market under Section 271 is for the BOC to have executed agreements with potential competitors and that there is no requirement that competitors be operational in a meaningful sense in order to satisfy Section 271.<sup>39</sup> This interpretation is consistent with the DOJ's recommendation of a performance benchmark approach that would measure the availability of functional and operable wholesale support processes in an attempt to prevent a BOC from "backsliding relative to its pre-entry performance."<sup>40</sup>

The DOJ recognized in its evaluation of SBC's Section 271 request for Oklahoma that if successful competitive entry

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<sup>39</sup> The actual versus potential competition issue is also relevant to the Track A versus Track B distinction as the DOJ emphasized in its evaluation of SBC's Section 271 application in Oklahoma. The Michigan Public Service Commission also recognized this distinction last week when it concluded that Track B has no application where there are actual competitors present. In re City Signal Inc. (Brooks Fiber) for an Order Establishing Interconnection Arrangements with Ameritech Michigan, MPSC Case No. U-10647 (Order dated February 23, 1995). Perhaps for this reason, Ameritech does not attempt to argue, in the alternative, as did SBC, that it satisfies Track B's requirements.

<sup>40</sup> DOJ Comments in SBC Section 271 Proceeding at 47.

does not exist, Section 271's public interest provision requires the Commission, as well as the DOJ, to "take a much harder look at the record to determine whether it [the BOC] has cooperated fully and done everything needed to make entry possible, or whether any barriers to entry still exist."<sup>41</sup>

It is very possible that the lack of substantial operational local competition in Michigan may be attributable to Ameritech's actions. The saga of Brooks Fiber's complaint against Ameritech at the Michigan Public Service Commission indicates that this is so.<sup>42</sup> The DOJ reached that conclusion regarding SBC in that company's Section 271 proceeding: "SBC's failure to provide adequate facilities, services and capabilities for local competition is in large part responsible for the absence of substantial competitive entry."<sup>43</sup> Based on this rationale, the DOJ in that case emphasized that "as the local market in Oklahoma has not been irreversibly opened to competition, it would not be in the public interest to grant

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<sup>41</sup> Id. at 48.

<sup>42</sup> In re City Signal Inc. (Brooks Fiber) for an Order Establishing Interconnection Arrangements with Ameritech Michigan, MPSC Case No. U-10647 (Order dated February 23, 1995).

<sup>43</sup> DOJ Comments in SBC Section 271 Proceeding at 36.

SBC's application for interLATA authority."<sup>44</sup> Similarly, Ameritech's Application fails to demonstrate that the local market in Michigan has been irreversibly opened to competition and accordingly, granting Ameritech Section 271 authority for Michigan is not in the public interest.

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<sup>44</sup> Id. at 37 (emphasis added).

**CONCLUSION**

For the foregoing reasons, Ameritech's Application for Section 271 Authority in Michigan, submitted on May 21, 1997 should be, in all respects, DENIED.

Respectfully submitted,

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Dated June 10, 1997

**CERTIFICATE OF SERVICE**

I, Catherine P. McCarthy, hereby certify that a true and correct copy of the foregoing Comments of Time Warner Communications Holdings, Inc. was served, this 10th day of June, 1997, via overnight mail, hand-delivery or First Class Mail, as indicated, to the following:

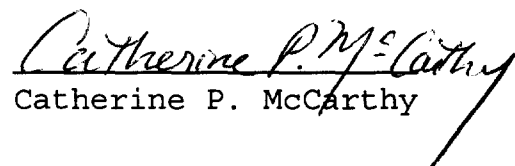
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